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3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169-5996  
Facsimile (702) 949-8321  
Telephone (702) 949-8320

Susan M. Freeman AZ State Bar No. 004199  
Email: [sfreeman@lrlaw.com](mailto:sfreeman@lrlaw.com)  
Rob Charles NV State Bar No. 006593  
Email: [rcharles@lrlaw.com](mailto:rcharles@lrlaw.com)  
John Hinderaker AZ State Bar No. 018024  
Email: [jhinderaker@lrlaw.com](mailto:jhinderaker@lrlaw.com)

Attorneys for USACM Liquidating Trust

ORRICK, HERRINGTON & SUTCLIFFE LLP  
MARC A. LEVINSON (CA 57613, pro hac vice)  
JEFFERY D. HERMANN (CA 90445, pro hac vice)  
400 Capitol Mall  
Sacramento, California 95814  
Telephone: (916) 447-9200  
Facsimile: (916) 329-4900  
Email: [malevinson@orrick.com](mailto:malevinson@orrick.com)  
[jhermann@orrick.com](mailto:jhermann@orrick.com)

BECKLEY SINGLETON, CHTD.  
BOB L. OLSON (NV 003783)  
ANNE M. LORADITCH (NV 008164)  
530 Las Vegas Boulevard South  
Las Vegas, NV 89101  
Telephone: (702) 385-3373  
Facsimile: (702) 385-5024  
Email: [bolson@beckleylaw.com](mailto:bolson@beckleylaw.com)  
[aloraditch@beckleylaw.com](mailto:aloraditch@beckleylaw.com)

Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re:  
  
USA COMMERCIAL MORTGAGE COMPANY,  
  
USA CAPITAL REALTY ADVISORS, LLC,  
  
USA CAPITAL DIVERSIFIED TRUST DEED FUND,  
LLC,  
  
USA CAPITAL FIRST TRUST DEED FUND, LLC,  
  
USA SECURITIES, LLC,  
  
Debtors.

Case No. BK-S-06-10725-LBR  
Case No. BK-S-06-10726-LBR  
Case No. BK-S-06-10727-LBR  
Case No. BK-S-06-10728-LBR  
Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under Case No. BK-S-06-10725 LBR

**Objection of USACM Trust To Martin Irwin's  
Claim Filed in Wrong Debtor's Case; Objection  
of DTDF to Proposed Allowance of Claim; and  
Certificate of Service**

Hearing Date: October 15, 2007  
Hearing Time: 9:30 a.m.

**Affects:**

- ☐ All Debtors  
☒ USA Commercial Mortgage Company  
☐ USA Capital Realty Advisors, LLC  
☒ USA Capital Diversified Trust Deed Fund, LLC  
☐ USA Capital First Trust Deed Fund, LLC  
☐ USA Securities, LLC

Martin Irwin ("Irwin") filed Proof of Claim No. 10725-00598 against USA Commercial Mortgage Company ("USACM") in the amount of \$24,023.66. The USACM Liquidating Trust (the "USACM Trust") hereby objects to Irwin's claim. The basis for the

claim is shown on the face of the proof of claim and in the attachment as an investment in USA Capital Diversified Trust Deed Fund, LLC (“DTDF”). Accordingly, it is a claim that was incorrectly filed in the USACM case. The USACM Trust respectfully requests that this claim be disallowed as a claim against USACM. Although DTDF has not yet filed a formal proof of claim against USACM, and there is no deadline for it to do so, DTDF has informally asserted a claim in excess of \$100 million and the parties have participated in one unsuccessful mediation on this and other issues. Because DTDF does assert a significant claim against USACM, any claim held by Irwin against USACM solely on account of the investment in DTDF is derivative of DTDF’s claims against USACM, and Irwin may not prosecute such claims on Irwin’s own behalf.

In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser, which owned two subsidiaries.<sup>1</sup> The president of Van Dresser looted the subsidiaries, ultimately forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed \$1.125 million in loans to the debtor, and had to repay them when debtor defaulted. Plaintiff then sued the debtor’s principal, and two other defendants (who he alleged aided and abetted the corporate looting) for various torts, including conversion, breach of fiduciary duty, and civil conspiracy.

The court stated that a debtor’s trustee has the exclusive right to assert a debtor’s claims, and that a claim belongs solely to the debtor’s estate if the debtor could have raised the claim at the commencement of the bankruptcy case.<sup>2</sup> Additionally, if a judgment against a defendant by either the debtor or another party asserting the debtor’s claim

<sup>1</sup> *In re Van Dresser Corp.*, 128 F.3d 945 (6<sup>th</sup> Cir. 1997).

<sup>2</sup> *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5<sup>th</sup> Cir. 1994); see also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing *Van Dresser* with approval in a case involving an LLC debtor).

precludes the other from recovery, then the claims are not independent of each other and belong exclusively to the debtor.<sup>3</sup>

Thus, because both the plaintiff and the debtor corporation could state claims for damages against the defendants, but only one could recover on those claims, by default the claims were exclusively property of the Van Dresser trustees.<sup>4</sup> In order for a plaintiff to bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff must be able to allege a distinct and specific injury.<sup>5</sup>

Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an asset purchase agreement that specifically included the assumption of debt owed to the debtor's managing member. The agreement fell through, and after the managing member filed an involuntary petition for relief against the debtor, the managing member asserted various causes of action against the purchasing company, including contract claims, debt assumption claims, misrepresentation claims, and interference claims.<sup>6</sup> The court, however, found that all of the claims involved both the debtor's managing member and the debtor itself, and thus the right to pursue all of the causes of action resided with the trustee.<sup>7</sup>

DTDF further objects to any allowance of Irwin's claim as a claim against the DTDF estate. DTDF has determined that Martin Irwin, Trustee of the Irwin Family Trust UAD 3/7/97 (the "Irwin Trust") has an allowed proof of interest in the DTDF case in the

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 948.

<sup>5</sup> *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the suits on the guaranty).

<sup>6</sup> *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

<sup>7</sup> *See also In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine whether action is individual or derivative based on state law, and the preferred shareholders breach of fiduciary duty claims were derivative per Delaware law); *In re Van Dresser*, 128 F.3d at 947 ("whether a creditor has sole right to a cause of action is determined in accordance with state law").

1 amount of \$24,023.66. This objection does not seek to prejudice the rights of the Irwin  
2 Trust as a DTDF member to recover from the DTDF estate on a pro rata basis on account  
3 of the Irwin Trust's membership interest in the amount of \$24,023.66. The Irwin Trust  
4 shall retain an interest in DTDF in the amount of \$24,023.66, as reflected in the books and  
5 records of DTDF, and the Irwin Trust is entitled to receive distributions on a pro rata basis  
6 with all other DTDF members.

7 Accordingly, the USACM Trust and DTDF seek entry of an order that will disallow  
8 the Irwin's claim against USACM, disallow any proposed allowance of the Irwin's claim  
9 in the DTDF case, and appropriately allow Irwin to retain an equity interest in DTDF in  
10 the amount of \$24,023.66 as reflected in the books and records of DTDF as of April 13,  
11 2006.

12 This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of  
13 Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

14 Dated: September 4, 2007.

15 **BECKLEY SINGLETON, CHTD.**

16 By /s/ Anne M. Loraditch  
17 Bob L. Olson (NV Bar #3783)  
18 Anne M. Loraditch (NV Bar # 8164)  
19 530 Las Vegas Boulevard South  
20 Las Vegas, Nevada 89101  
21 Telephone: (702) 385-3373

22 and

23 **ORRICK, HERRINGTON &  
24 SUTCLIFFE LLP**

25 Marc A. Levinson  
26 Jeffery D. Hermann  
400 Capitol Mall, Suite 3000  
Sacramento, California 95814-4497  
*Attorneys for Post-Effective Date USA  
Capital Diversified Trust Deed Fund, LLC*

**LEWIS AND ROCA LLP**

By: /s/ John Hinderaker (018024)  
Susan M. Freeman  
Rob Charles  
John Hinderaker  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169-0961  
Facsimile (702) 949-8321  
Telephone (702) 949-8320  
*Counsel For USACM Liquidating Trust*

Certificate of Service

I certify that a copy of the foregoing was served via first class mail, postage prepaid,  
addressed as set forth below, on this 4th day of September, 2007 to:

Martin Irwin  
5221 Lindell Rd M102  
Las Vegas, NV 89118

/s/ Renee L. Creswell  
Renee L. Creswell  
Lewis and Roca LLP